J., rendering the opinion, that the total omission of the *ad damnum* clause in a declaration in case was fatal on demurrer, and if the demurrer is overruled the judgment will be arrested on motion; that the *ad damnum* clause is one of substance and not mere matter of form, though holding that had there been no demurrer the verdict would have cured the defect, which the court admitted was a strong argument against holding it fatal on demurrer. Though in the *McGlamery* case, *supra*, no damages were mentioned at all, and in the principal case they were mentioned in the commencement of the declaration, yet the principal decision seems to indicate a more liberal construction of pleadings, the court apparently being won over by the reasoning, which it had previously in the *McGlamery* case admitted was strong. As a general rule the omission of the *ad damnum* clause is cured by verdict. *Farley* v. *Nelson*, 4 Ala. 183; *Koehler* v. *King*, 119 Ill. App. 6; *Brauns* v. *Glesige*, 130 Ind. 167; *Humphreys* v. *Daggs*, 1 Greene (Ia.) 435; *Poindexter* v. *Turner*, Walk. (Miss.) 349; *Fox* v. *Graves*, 46 Neb. 812; *Ward* v. *Stevenson et al.*, 15 Pa. St. 21; *Groves* v. *Dodson*, 8 Yerg. 161; *Palmer* v. *Mill*, 3 Hen. & M. 502 (Va.); *British Col. Bank* v. *Pt. Townsend*, 16 Wash. 450; *Weaver* v. *Miss. & Rum River Boom Co.*, 28 Minn. 542; *Bartlett* v. *O. F. Savings Bank*, 79 Cal. 218; *Loeb* v. *Kamak*, 1 Mont. 152; see also *Denver etc. Ry. Co.* v. *Klaes*, 40 Colo. 125. In the following cases the omission was held fatal on demurrer. *Brownson* v. *Wallace*, Fed. Cas. No. 2,042; *Treusch* v. *Kamke*, 63 Md. 274; *Deveau* v. *Skidmore*, 47 Conn. 19; but see *Vincent* v. *Mutual Reserve Fund L. Ass.*, 75 Conn. 650. It is generally held however that in the absence of the *ad damnum* clause a judgment by default cannot be sustained, because the plaintiff is not entitled to recover more than he has demanded in his pleadings. *Pittsburgh Coal Min. Co.* v. *Greenwood*, 39 Cal. 71; *May* v. *State Bank*, 9 Ind. 233; *Andrews* v. *Monilaws*, 8 Hun 65.

PLEADING—A LIBERAL VIEW AS TO WHAT CONSTITUTES VARIANCE.—Action for death due to negligence of defendant. The complaint alleged that a servant of defendant "caused or allowed said engine to run upon or against said intestate." Proof that the engine did not touch him but that he was killed by reason of a boxcar eighteen car lengths from the engine being backed into him. *Held*, not a material variance, ANDERSON, J., and MAYFIELD, J., dissenting. *Alabama Great Southern R. Co.* v. *McFarlin* (Ala. 1911), 56 South. 989.

The court said that "the engine was the instrument which caused the collision" whether the intestate was struck by the engine or something attached to it. But the rule is that proofs must correspond substantially with the allegations. 31 CYC. 700; 22 ENCY. PL. & PR. 527. In *Wabash Western Ry. Co.* v. *Friedman*, 146 Ill. 583, the court said that matters of description, though unnecessary, must be proved, and that "one great object of a declaration is to notify the defendant of the nature and character of the plaintiff's demand, so that he may be able to prepare for a defense; but if one ground of action may be alleged and another proved, a declaration would be a delusion, and instead of affording a defendant notice of what he was called upon to meet, it would be a deception." In *Pennington* v. *Detroit, etc. Ry. Co.*, 90 Mich. 505, cited

by MAYFIELD, J., in his dissenting opinion, it was held there was a fatal variance between a declaration alleging a freight train had commenced to back up, uncontrolled by brakeman or engineer, and proof that the train was moving forward under the order of the conductor. As MAYFIELD, J., said, the negligence charged in the principal case was that of the engineer, while that proved (if any) was by the conductor or flagman. Where definite acts of negligence are alleged, proof will be confined to those acts, nor can a recovery be had upon proof of other acts of negligence. See 22 ENCY. PL. & PR. 527 and the cases there cited, also *Chun* v. *Ky. etc. Receivers,* 23 Ky. Law Rep. 1092, 64 S. W. 649; *Thompson* v. *Citizens St. Ry. Co.,* 152 Ind. 461; *Gagan* v. *City of Janesville,* 106 Wis. 662; *Moss.* v. *North Car, R. R. Co.,* 122 N. C. 889; *Raming* v. *Metropolitan St. Ry. Co.,* 157 Mo. 477. Many cases hold the variance, to be material, must mislead or surprise the adverse party, and it is often provided by statute that the other party must have been actually misled. 31 CYC. 703. Thus in *Oborn* v. *Nelson,* 141 Mo. App. 428, an averment that plaintiff was injured while performing his duties as pressman, and proof that he was an assistant, but performed the same duties, was held not a material variance. See also *Texas & P. Ry. Co.* v. *Kirk,* 62 Tex. 227. A variance may be waived by failure to object at the proper time. *Linquist* v. *Hodges,* 248 Ill. 491; *Cohen* v. *Giveen Mfg. Co.,* 141 App. Div. 616, 126 N. Y. Supp. 505. As to what is material must necesarily vary with different judges. The principal case seems to indicate a most liberal tendency on the part of the Alabama court, to be commended if not carried too far, but it would seem that one purpose of pleading—notice to the other side—was not sufficiently accomplished in that case. Furthermore it seems to establish a new rule of construction in that jurisdiction. In *Smith* v. *Causey,* 28 Ala. 655 the court said: "plaintiff averred that the dogs were defendant's; and although this averment was unnecessary, yet, as it is descriptive of the tort complained of, it can not be disregarded. The tort alleged is an injury done by the servants with defendant's dogs. To allow a recovery for an injury done with other dogs would be to set up by proof a cause of action different from that alleged, and of which the defendant had no notice." See also *Birmingham etc. Ry. Co.* v. *Brannon,* 132 Ala. 431; *Alabama Great So. Ry. Co.* v. *Fulton,* 150 Ala. 300; *Southern Ry. Co.* v. *Hundley,* 151 Ala. 378.

VENDOR AND PURCHASER—ACTUAL NOTICE OF DEFECTIVELY ACKNOWLEDGED CONVEYANCE.—Action to enforce rights in a tract of land. Plaintiff claimed under a mortgage, duly recorded but not acknowledged. Defendant, though he had found plaintiff's mortgage on file, claims as bona fide purchaser from the plaintiff's mortgagor, because of the lack of proper acknowledgment of the mortgage. *Held,* a conveyance which has not been acknowledged or proved, so as to be entitled to record, but which in fact has been recorded in the office of register of deeds, is void as to one who subsequently buys the land with actual knowledge of the contents of the record, if he is otherwise an innocent purchaser for value. *Nordman* v. *Rau* (Kan. 1911), 119 Pac. 351.

In this country it has been uniformly held that the record of a conveyance,